

File 02/2  
September 26, 1973  
(Marianas Political Status Commission)

MEMORANDUM FOR: Mr. Willens  
FROM: Peter D. Bewley  
RE: Marianas Political Status Commission

MEMORANDUM ON THE UNITED STATES GOVERNMENT  
CONTRACT ASPECTS OF THE CONSTRUCTION AND  
SUPPLY OF A MILITARY BASE IN THE MARIANAS

This memorandum discusses current United States Government procurement law relating to construction and supply of military bases, as that law would apply to a military base located in the Marianas, for the purpose of determining what rights the people of the Marianas have to participate in such construction and supply, and makes recommendations regarding provisions of law that might be proposed to advance the interests of the people of the Marianas in such construction and supply.

I. United States Government Procurement Law

A. An Overview

United States Government procurement law is promulgated and applied to advance governmental policy. The primary goal is to obtain for the government needed goods and services as economically as possible. Competition among suppliers is relied upon to achieve this goal. The most striking characteristic of the law is the emphasis placed throughout on obtaining competition (generally through advertising for bids) among as many sources as

is feasible in order to insure that the government is receiving the best available quality, delivery schedule, price, etc.<sup>\*/</sup>

More remarkable, however, is the fact that procurement law is used to advance social and political ends in derogation of economic ends -- if the two can ever really be separated. Thus, the law contains provisions forbidding contract awards, inter alia, to firms practicing racial discrimination,<sup>\*\*/</sup> firms that do not pay prescribed wages to their employees,<sup>\*\*\*/</sup> and firms that have certain dealings with Communist countries,<sup>\*\*\*\*/</sup> despite the fact that such firms may make the best offer in the purely economic sense. This memorandum deals generally with provisions of law enacted to foster social and political goals because it is those provisions that most directly affect the Marianas.

B. Scope

The discussion herein is narrowly limited to the question proposed above. Provisions of law that do not

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<sup>\*/</sup> E.g., 10 U.S.C. § 2304 (1970).

<sup>\*\*/</sup> See, Executive Order No. 11246.

<sup>\*\*\*/</sup> See, 40 U.S.C. § 327 et seq. (1970).

<sup>\*\*\*\*/</sup> See, Armed Services Procurement Regulation, Part 6, § 401.1 (1973).

relate to the construction and supply of the base on Tinian are not considered. Thus, statutes providing for military assistance to foreign countries are not included. Grants or contracts made for research and development purposes, grants to educational institutions, defense systems procurement, and the like are excluded. Prohibitions in the Buy American Act are not discussed because, although they make it impossible for the Marianas to ~~export~~ many products to the United States, they do not relate to construction and supply in the Marianas. Although there is a substantial body of law found in the Federal Procurement Regulations, which are applicable to civilian procurement, only Department of Defense regulations are considered because it is that organization that will be procuring the supplies and services in this case.

Judgments have been made concerning the likelihood that some products or services could be provided by the people of the Marianas, and provisions relevant to procurement of products or services thought to be unavailable in the Marianas either indigenously or through import brokers have not been analyzed. Thus, provisions concerning procurement of architectural and engineering services, or other professional or consulting services relating to base construction and supply are not considered. Shipping services

are discussed only in connection with supply of construction materials and other supplies to the base on Tinian.

Procedures to be followed in bidding upon or negotiating for government contracts are discussed only when such procedures may determine the likelihood that a Marianas concern could obtain a contract. Persons or firms wishing to obtain government contracts should contact competent counsel to assist them and should not rely on statements in this memorandum as constituting the law with regard to any particular procurement action. (Each statute or regulation cited hereafter appears in the appendix.)

C. Particular Laws and Regulations

(1) Laws and regulations having an adverse impact.

(a) ASPR 6-805.1

Only one existing regulation, issued in accordance with the Department of Defense Balance of Payments Program, may have significant adverse impact on the ability of Marianas' firms to compete for construction and supply contracts. That regulation is Armed Services Procurement Regulation ("ASPR") 6-805.1:

"Except as provided in 6-805.2, proposed procurement of supplies for use outside the United States shall be restricted to United States end products. Proposed procurement of foreign services shall be made only if authorized by 6-805.2"

The United States, for purposes of this provision, is defined as including only the States, the District of Columbia, Puerto Rico, and United States possessions. The Trust Territory is not included. (ASPR 6-001(c)). As United States and product is an unmanufactured product mined or produced in the United States or a manufactured product that has been manufactured in the United States and whose United States components account for 50 per cent of the cost of all components. Foreign services are services performed outside the United States. (ASPR 6-001(d))

The net effect of this provision is to prohibit procurement of supplies (foreign construction services, utility services, etc., will obviously have to be procured) unless the product is grown, produced, or manufactured in the United States. Thus, Marianas' firms bidding on contracts will be precluded from offering, for example, Japanese or Australian products. Indigenous products will also be excluded. This creates no real problem, however, because the only indigenous supplies available are bulk construction materials such as sand and gravel which are specifically exempted from the prohibition of the section cited by the following section.

(b) ASPR 6-805.2

The following section (ASPR 6-805.2), in addition to exempting bulk construction materials, exempts ten

other classes of products and services. (See Appendix). The most important exemption is found at ASPR 6-805.2 (a)(i): "Procurements required to be made from indigenous sources pursuant to a treaty or executive agreement between governments." Recognizing that no materials or supplies are available in the Marianas, nevertheless, it is proposed that the following clause be offered to appear in an executive agreement between the United States and the government of the Marianas:

All supplies, as that term is used in Armed Services Procurement Regulation Part 6, section 805, in effect on this date, procured for the construction or supply of \_\_\_\_\_ Base shall be procured from indigenous sources. "Indigenous sources" are defined for purposes of this clause as being persons who are citizens of the Marianas and corporations, partnerships, or other firms of which at least 50 per cent of the equity interest is owned by citizens of the Marianas or the government of the Marianas.

The effect of such a provision would be two fold. It would enable Marianas' firms to provide products produced anywhere, not only in the United States; and, in conjunction with a proposed Marianas statute suggested below, it would require all procurement of supplies, whether by contractors or by the United States Government, to be made through Marianas' firms. A fallback position might involve

a clause to the effect that ASPR 6-805.1 would not be deemed to prohibit procurement in the Marianas of foreign end products.

A cleaner, simpler approach, which would not solve the problem of supplying foreign end products but which would remove any restrictions on the supply of Marianas' products and services, would be to agree that, for all government procurement purposes, the Marianas are to have the same status as Puerto Rico or United States possessions.

(c) ASPR 18-503

One other provision relating to foreign procurement has an immediate bearing on the problem. ASPR 18-503 states:

"Purchase of materials, equipment and supplies for construction overseas shall generally be the responsibility of the contractor performing the work; but where necessary to comply with foreign law, or to avoid taxation, or to obtain other advantages, purchase may be by the United States. Contracting officers shall consider savings that may be obtained by exemptions from import and other taxes and, to the extent economical, shall take advantage of tax exemptions available under existing agreements. See 11-403. In specifying materials, supplies, and equipment for construction in foreign countries, contracting officers shall make maximum use of foreign currencies available for the project, shall encourage the use of American materials, equipment, and supplies and shall obtain the maximum feasible competition from indigenous, other foreign and American suppliers."

"Overseas" and "foreign countries" mean anywhere outside the United States, Puerto Rico, and the possessions. The Marianas are considered to be foreign. (ASPR 18-506.6). The most important point about this clause is that it authorizes procurement by the United States, rather than by a contractor, when necessary or advantageous. This provision, coupled with a provision such as was suggested above relating to purchases from indigenous sources, could assure the Marianas that only Marianas' firms obtain supply contracts for base construction. To obtain this benefit, no agreement with the United States would be necessary; it would be sufficient for the Marianas to pass a law providing that:

No materials, equipment, or supplies used in connection with the construction, maintenance, repair, or renovation of any building, facility, or other structure, including improvements, such as roadways, related thereto, accomplished at the order of a foreign government, shall be purchased, leased, rented, or otherwise obtained except by that government; Provided that, a contractor may purchase or otherwise obtain incidental office supplies and equipment, including paper, typewriters, and the like, not intended to be incorporated in the construction project.

This proposed law, when coupled with the clause just suggested, would, in effect, make all construction procurement, except the procurement of construction services, subject



to agreement between the United States and the Marianas and would insure that all supply contracts are awarded to Marianas' firms.

ASPR 18-503 would seem to be of some benefit in that it requires the contracting officer to obtain the maximum feasible competition from indigenous sources, as well as from others. Standing alone, the benefits of this requirement are ullusory. Marianas' firms are in no position to compete on equal terms with outside sources for any significant portion of construction or supply contracts because such firms lack the necessary experience, financial resources, and know-how. A much stronger clause, such as was suggested above, is needed if Marianas' firms are to be guaranteed substantial participation.

Finally, the clause requires the United States Government contracting officer to "encourage the use of American materials, equipment, and supplies." There is no requirement that such supplies be used, but a clause such as was set out above, requiring or permitting use of foreign end products, would be desirable in order to make it clear that non-American products may be offered by Marianas' firms. There is precedent for taking such a position; the Republic of Panama has obtained an exemption from the Buy American Act, which prohibits the use of foreign end

products in goods supplied to the Government in the United States, for Panamanian supplies used in the Canal Zone. (ASPR 18-508.3).

(d) 40 U.S.C. § 270

Certain other laws are peripherally relevant to this discussion. The Miller Act, 40 U.S.C. § 270(a) (1970) requires a construction contractor to provide bonds to the government to insure that contractor's performance. The same act provides that the bond requirement may be waived in cases of foreign construction if it is "impracticable for the contractor to furnish" the requisite bond. It is proposed that an agreement between the United States and the Marianas include a clause providing that it is deemed to be impracticable, for purposes of the Miller Act, for a Marianas contractor to provide bonds.

(e) 10 U.S.C. § 2381

In this same connection, 10 U.S.C. § 2381(1970) provides that a secretary of a military department may require that a guarantee accompany a bid. The clause suggested above should also provide that no guarantee of a bid shall be required of a Marianas contractor.

(f) 10 U.S.C. § 2631

Section 2631 of 10 U.S.C. (1970) provides generally that only United States flag vessels may be used to

transport supplies bought for the armed forces. This memorandum does not pretend to deal with maritime law and therefore does not analyze the question whether a Marianas' vessel is of United States registry. If that is not the case, a provision might be warranted that would either deem Marianas' vessels to be United States vessels for purposes of the subject section or give the Marianas the same status as the United States under the subject section.

(g) 10 U.S.C. § 7308

Relevant to the above provision is 10 U.S.C. § 7308 (1970), which authorizes the Navy to give to "any State Territory, Commonwealth, or possession of the United States" any obsolete, condemned, or captured vessel. If the Marianas become a Commonwealth or possession, they will automatically benefit from this provision. Otherwise, the statute should be amended to include the Marianas as a possible donee.

(h) Defense Appropriation Act,  
1973

Finally, Section 724 of the Department of Defense Appropriation Act, 1973, prohibits the use of funds thereby appropriated to purchase food, clothing, certain cloth, or specialty metals that are not grown or produced in the United States or its possessions. It does not seem likely

that the Marianas would be able to supply any of those goods, other than food, in any event. As to food, there is an exemption in the act for perishable food to be supplied to a foreign base. The provision appears to have no impact on the Marianas, and no recommendation is made concerning the provision.

2. Advantageous laws and regulations

(a) Small Business Act

Perhaps the most important law with regard to military procurement in the Marianas is the Small Business Act (the "Act"), 15 U.S.C. § 630 (1970), et seq.) and Department of Defense regulations issued pursuant thereto. (See Appendix). The Act applies to firms having a place of business in the Marianas (15 U.S.C. § 633(a) (1970); ASPR 1-701.1(a)(1)). Any legislation changing the status of the Marianas should specifically state that the Act remains applicable.

The Act provides generally that it is the policy of the United States Government to aid, counsel, assist, and protect small business. In order to carry out this policy, the Small Business Administration has been created; and various provisions have been made for the participation of small business in United States Government procurement.

The Small Business Administration is empowered to make loans to small businesses, to guarantee their obligations,

and to provide them with technical and managerial aid in connection with United States Government procurement. In addition, the Small Business Administration may enter into contracts with the Government to provide supplies or services and can then subcontract to small business concerns. Particular procurement actions, or parts thereof, may be set aside for award to small businesses only; and prime contractors may be required to offer some sub-contracts to small businesses.

The Act and implementing regulations, and the Small Business Administration, can certainly be of great help to Marianas' concerns that wish to bid on United States Government contracts. They do not guarantee, however, that such concerns will receive a significant portion, if any, of those contracts. Small businesses must still prove their capacity to perform the contract, and most of the criteria used to determine capacity are simply lacking as to Marianas' concerns:

"'Capacity' means overall ability of a prospective small business contractor to meet quality, quantity, and time requirements of a proposed contract and includes ability to perform, organization, experience, technical knowledge, skills, 'know-how,' technical equipment, and facilities or the ability to obtain them." (ASPR 1-705.4(a)).

The Act, however, coupled with a provision such as was suggested above requiring all procurement to be made

through Marianas' citizens or the Marianas' Government, without regard to the capacity of the contractor, would provide invaluable financial and managerial assistance to Marianas' firms that would be awarded such contracts. In the absence of such a mandatory provision, the Act would provide assistance only in those few instances where indigenous firms have or could otherwise develop the capacity to perform such contracts.

(b) Department of Defense  
Contract Financing

In addition to the specific provisions noted above related to the financing of small business concerns, the Department of Defense is authorized to help finance performance of any contract in a variety of ways, including the making of interest bearing or interest free loans, the guaranteeing of contractor obligations, and the making of progress payments on partially completed contracts. The statutory basis for these powers is generally 50 App. U.S.C. 2091 (1970); 10 U.S.C. 2307 (1970) and P.L. 85-804, 72 Stat. 972 are also relevant. Implementing regulations are found in ASPR Appendix E.

The policy of the Department of Defense is that the prospective contractor's need for financial assistance of one kind or another should not prejudice the decision whether to award the contract to that firm. (ASPR App. E-210)

The firm must, however, prove its ability to complete the contract. Factors to be considered include the financial capability to perform, taking into account loans to be made available by the United States Government; the judgment, skill, and integrity of the potential contractor; the potential contractor's reputation and experience; and the other factors noted above with regard to small business loans. (ASPR App. E-211).

Only one provision casts doubt on the availability of financial assistance to Marianas firms. ASPR App. E-220.3. states that guarantees of loans to foreign contractors in foreign countries are not generally made because of the difficulty of enforcing the loan agreement. "Foreign country" is not defined, but the term would probably be deemed to include the Marianas. Any agreement between the United States Government and the Marianas should include a provision that Marianas' contractors will not be precluded from obtaining loan guarantees solely because they are located outside the United States.

Generally, the United States will not guarantee 100 per cent of any loan. (ASPR App. E-307). This general policy is abrogated only in exceptional cases. It would undoubtedly be helpful if a clause could be agreed upon that would specifically authorize 100 per cent loans to Marianas' firms.

Subcontractors may obtain guarantees of loans directly from the United States Government and need not be connected in any way with the prime contractor.

Loans, or "advance payments," are also available directly from the Government, although the granting of such loans is looked upon as a less desirable practice than providing a guarantee. Such loans usually bear interest. Provision is made, however, for interest free loans in exceptional circumstances. (ASPR App. E-403). A clause deeming all contracts with Marianas' firms to have been awarded under exceptional circumstances within the meaning of the term as used in the above-cited provision would enable such firms to receive direct interest free loans from the United States Government if no other source of funds were available.

ASPR App. E-409 sets out standards for use in determining whether a loan should be granted. Marianas' firms would benefit if a clause could be negotiated that would deem a request by a Marianas' firms for a loan to meet those requirements if accompanied by an affidavit to the effect that no other financing was available.

The same procurement regulations describe circumstances when progress payments will be made available. (ASPR App. E-500 et seq.). Generally, progress payments are available only in certain specified situations and



only up to 85 per cent of costs incurred by the contractor. (ASPR App. E-504.1, 505). An agreement should be made that all contracts awarded to Marianas' firms will provide for progress payments and that such progress payments may be 100 per cent progress payments if so requested by the prospective contractor.

ASPR App. E-513 states a policy that prime contractors should provide progress payments to their subcontractors. In cases of Marianas' subcontractors, non-Marianas' prime contractors should be required to provide progress payments.

## II. Conclusion

There is no provision of law that guarantees to Marianas' firms the award of any proportion of United States Government work related to the base on Tinian. There are several provisions that would deny Marianas' contractors the right to supply certain goods, but these provisions are insignificant in terms of the capacity of the Marianas to supply such goods.

If no changes in current procurement law are made, it is likely that the United States Government will procure some services and supplies from Marianas' concerns. Suggested above are several clauses that would result in all procurement awards being made to Marianas' firms. It is

extremely unlikely that such provisions would be agreed to by the United States, primarily because the Marianas do not have the current ability to provide any substantial part of the United States Government's needs. Therefore, while advancing the suggested clauses as an opening point in the negotiations, the ultimate goal of the Marianas should be to obtain small changes in the contract financing regulations in order to enable Marianas' concerns to obtain cheap or free 100 per cent financing when they bid on United States Government contracts.